In the

United States Circuit Court of Appeals

For the Ninth Circuit 2

No. 4522

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

WONG JUN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

THOS. P. REVELLE
United States Attorney
DONALD G. GRAHAM
Assistant United States Attorney
Federal Building
Seattle, Washington

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STATEMENT OF THE CASE

Wong Jun, hereafter referred to as respondent, upon her arrival from China, July 9, 1924, on the S. S. "President Jefferson," applied for admission to the United States as minor daughter of a

domiciled Chinese merchant. She claims to have been born in China August 20, 1904, to be unmarried and to be the daughter of Wong Chai Chong.

The father, Wong Chai Chong, was born in China and first came to this country September 4, 1910, through the port of San Francisco, as a Hong Kong Section 6 merchant. He has never been to China since. He claims the status of a merchant at the present time by virtue of the fact that he has $1,000 interest in the Wong Kew Restaurant, Philadelphia, Pennsylvania, that he was connected with that establishment for several years prior to appellee's arrival, at first as cashier, and since September, 1923, as assistant manager. He is stated to have charge of the restaurant when the manager is absent and also to take cash and assist in "checking and counting up at the end of the day."

The partnership list shows that Wong Leong Bing is steward of the restaurant and it would hence seem probable that he attends to the buying for the restaurant. It also appears that his financial interest is three times greater than that possessed by the other alleged active partners.

Respondent was given hearings before a Board of Special Inquiry at Seattle on July 18, 1924, and on August 14, 1924, and was denied admission under the Immigration Act of 1924, on the ground that she was an alien ineligible to citizenship and did not come within any exemption in said Act. On appeal to the Secretary of Labor, the decision of the Board of Special Inquiry was affirmed.

Thereafter respondent was ordered deported and a petition for a Writ of Habeas Corpus was filed. After a hearing on an order to show cause why a Writ of Habeas Corpus should not issue, an order was entered September 23, 1924, by the Honorable Jeremiah Neterer, granting the writ but making same returnable October 1, 1924, for the purpose of affording opportunity to the Board of Special Inquiry to further examine the alien and determine her physical and mental fitness under the Immigration Law and her relationship to her alleged father.

On September 26, 1924, the respondent was given a hearing before a Board of Special Inquiry at the United States Immigration office at the port of Seattle, Washington, with a view to determining her relationship to Wong Chai Chong, her alleged father, and subsequently said Wong Chai Chong was examined at Philadelphia, Pennsyl-

vania, and respondent's two alleged brothers were examined at San Francisco, California, for the same purpose. An investigation was also conducted at Philadelphia, Pennsylvania, to determine the mercantile status of Wong Chai Chong. Thereafter, on November 21, 1924, respondent was given another hearing before the Board of Special Inquiry which conceded that respondent is the daughtre of Wong Chai Chong and also conceded the latter's claim as to his connection with and duties in the Wong Kew Restaurant, but denied respondent admission for the reason that her father, Wong Chai Chong, was not a "merchant" within the meaning of the law, this cause of denial being under the Act of November 3, 1893 (28 Stat. L. 7) "amending the law prohibiting the coming of Chinese persons into the United States and providing for registration of resident laborers," and being a cause additional to the previous causes of denial under the Immigration Act of 1924.

Thereafter an appeal was taken to the Secretary of Labor and said appeal was dismissed.

Thereafter a motion was filed in the United States District Court for the Western District of Washington, Northern Division, to dismiss the Writ of Habeas Corpus as to respondent, Wong

Jun, and after argument said motion was denied and the writ granted by the Honorable Jeremiah Neterer, January 15, 1925.

The Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted and the following assignments of error were urged:

1

The court erred in holding and deciding that the petitioner, Wong Jun, did not have a fair and impartial trial before the Board of Special Inquiry and the Secretary of Labor.

2

The court erred in holding and deciding that a Writ of Habeas Corpus be accorded to the petitioner, Wong Jun.

3

The court erred in holding, deciding and adjudging that the petitioner, Wong Jun, be discharged from the custody of Luther Weedin as Commissioner of Immigration at the port of Seattle.

4

The court erred in deciding, holding and adjudging that the petitioner, Wong Jun, was not subject to exclusion and deportation, but was entitled to come into and remain in the United States.

Respondent's exclusion can be predicated solely on the Chinese Exclusion Law without resorting to the Immigration Act of 1924. Inasmuch as the question of the admissibility of minor children of domiciled Chinese merchants, as affected by the Immigration Act of 1924, has been certified to the Supreme Court of the United States, it is felt that Your Honors probably will not care to pass upon the admissibility of respondent under that Act. A stipulation has, therefore, been entered into between counsel for the Commissioner of Immigration and counsel for respondent to the effect that, in the event it becomes necessary and Your Honors do not care to rule upon this question of law, this part of the case may be held in abeyance and respondent's right to admission, insofar as same is affected by the Immigration Act of 1924, be determined by the decision of the Supreme Court of the United States upon the cases of like character now before it.

Respondent's Admissibility Under the Chinese Exclusion Law

Prior to the passage of the Immigration Act of 1924 it had become a settled principle that minor children of domiciled Chinese merchants were allowed to enter this country for the purpose of joining their fathers. This right was not expressly granted by the Treaty of 1880 but rests upon a decision of the Supreme Court of the United States. Three factors necessarily had to be established: (1) the minority of the applicant for admission, (2) the relationship of father and child, (3) the mercantile status of the father. In the present case the minority of respondent and the claim that she is a daughter of Wong Chai Chong have been conceded. The only question at issue is whether or not Wong Chai Chong is a "merchant." *It is submitted that he is not entitled to be classed as such.* The fact that Wong Chai Chong was admitted to this country nearly fifteen years ago under what is known as a Section 6 Certificate — that is, a certificate provided for by Section 6 of the Act of May 6, 1882, as amended and added to by the Act of July 5, 1884 (22 Stat. L. 58; 23 Stat. L. 115), does not *per se* clothe

him with a mercantile status at this time, his Section 6 Certificate having been required by law as a condition precedent to his admission and having no other effect than as *prima facie* evidence of his occupation in China prior to coming to this country. It has been held by the courts that a Chinese entering this country by virtue of holding such a document is not obligated to maintain a mercantile status indefinitely but is entitled to remain here notwithstanding a subsequent change in his status from merchant to laborer.

Lo Hop v. United States, 257 Fed. 489;

Lui Hip Chin v. Plummer, 238 Fed. 763.

Consequently, whether or not Wong Chai Chong is a "merchant" depends entirely on his present occupation (during the last twelve months), regardless of any mercantile status he may have had at the time of his original entry into this country.

Section 2 of the Act of November 3, 1893, *supra*, defines the term "merchant" as employed in said Act and in the Acts of which same is amendatory as having the following meaning *and none other:* "A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who

during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

This section further provides: "Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing." In view of this provision the Department of Labor has consistently held that, in order to obtain favorable endorsement of his mercantile status prior to his proposed departure for China, a Chinese merchant must establish that he has maintained a mercantile status for twelve months prior to his application. This rule has also been consistently applied in cases where Chinese merchants were bringing wives or minor children to this country.

See Rule of May 1, 1917.

The Supreme Court has held that it is not necessary that a partner's name shall appear in the title of the firm of which he is a member.

Tom Hong v. United States, 193 U. S. 517.

Therefore, the clause in the definition of "merchant" reading "which business is conducted in his name" is eliminated as a point of argument.

The courts have held that all Chinese not included in the exempted classes, i. e., teachers, students, merchants and travelers for curiosity, are laborers.

United States v. Ah Fawn, 57 Fed. 591;

Lai Moy v. United States, 66 Fed. 955;

United States v. Chung Ki Foon, 83 Fed. 143;

Lew Quan Wo v. United States, 184 Fed. 685;

Ong Chew Lung v. Burnett, 232 Fed. 853.

Ownership in a mercantile establishment is not sufficient to constitute a merchant unless the Chinese whose status is in question is engaged in buying and selling merchandise.

United States v. Wong Yew, 83 Fed. 832.

A salesman or manager of a mercantile business even though he is entitled to a percentage of the profits is not a merchant within the meaning of

the Immigration Act of 1917. "The confounding of occupations—that of salesman or manager with that of merchant—cannot be accepted. A merchant is the owner of the business; a salesman or manager, a servant of it; and especially so under the Immigration Law."

Tulsidas v. Insular Collector, 262 U. S. 259.

A Restaurant Keeper Is Not Engaged in the Business of Buying and Selling Merchandise

The term merchandise is defined by the Century Dictionary: "In general, any object of trade or traffic; that which is passed from hand to hand by purchase and sale; specifically the objects of commerce, the staple of a mercantile business; commodities, goods or wares bought or sold for gain."

It is defined by the Standard Dictionary as: "Anything moveable customarily bought and sold for profit; especially commodities traded in by merchants."

It is defined by Webster's New International Dictionary: "The objects of commerce; whatever is usually bought or sold in trade or market, or by merchants; wares; goods, commodities."

In the case of *Ah Yow*, 59 Fed. 561, the court held that a restaurant proprietor is a laborer. The court said:

"A restaurant keeper is a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw material to suit the tastes of his patrons. A person in that business is not a merchant, nor does he come within the definition of any of the terms used in the statutes to describe the class of Chinese who are privileged to enter the United States; and I hold that to the word 'laborer' in these statutes meaning must be given broad enough to include master mechanics and tradesmen such as blacksmiths, cabinet makers, tailors and shoemakers, who receive orders and cut and make up materials in such form and of such dimensions as their customers require. Those who, in following such callings employ journeymen, and perform no manual labor themselves still represent themselves to be, and they are, in popular estimation, blacksmiths, cabinet makers, tailors and shoemakers—that is to say, skilled workmen. All Chinese persons who follow such callings are barred from coming to the United States. I hold that a restaurant keeper belongs to the same class and is likewise barred."

In the case of the *United States v. Chung Ki Foon*, 83 Fed. 143, the court said:

"* * * In my opinion the words 'Chinese laborers' as used in Section 1 of the Act of November

3, 1893 (28 Stat. L. 7), refer not only to those actually engaged in manual labor at the date of the passage of that Act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, and those who are not officers, teachers, students, merchants, or travelers for curiosity within the meaning of the Treaty of November 17, 1880, between the United States and China."

The court also quoted the case of *Ah Yow*, 59 Fed. 561, and concurred with the decision in same, stating, "It was held, *and I think correctly* (italics ours), in the case of In re Ah Yow, 59 Fed. 561, that a restaurant keeper is to be classed as a laborer under a proper construction of the Act of Congress under consideration * * * ."

In the case of *Toxaway Hotel Co. v. Smathers & Co.*, 216 U. S. 439, the Supreme Court of the United States held that keeping a hotel was not a mercantile pursuit within the meaning of Section 4 of the Bankruptcy Act of 1898 and it was stated:

"To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink and the price

includes rent, service, heat, light, etc. To say that such a business is that of a 'trader' or a 'mercantile pursuit' is giving those words an elasticity of meaning not according to common usage."

In the case of *In re Wentworth Lunch Co.*, 159 Fed. 413, affirmed by the Supreme Court in a *per curiam* decision in 217 U. S. 591, the Circuit Court of Appeals for the Second Circuit said: "A trader is one who buys to sell again, a definition which might apply to a saloon but not to a restaurant, where the proprietor does not sell the provisions he buys in the form in which he buys them, but changes by combination and cooking into edible dishes. The word 'mercantile,' though including trade, is larger, being extended to all commercial operations, so that we speak of shipping merchants, commission merchants and forwarding merchants. Still, we do not think that the dishes of a restaurant would ever be described as merchandise, or the proprietor as a merchant, or as engaged in mercantile pursuits."

Although the cases just cited were under the Bankruptcy Act, it is difficult to understand why the word "merchandise" should have one meaning under that act and an entirely different meaning under the Chinese Exclusion Act, unless at least a

technical definition of the word were contained in each act. This is not the case and there is no reason why the term "merchandise" as used in the Act of November 3, 1893, *supra*, should have any different meaning than as generally defined and accepted. It would also be an extremely anomalous situation if an owner of or partner in a Chinese restaurant should be legally held to be a merchant for the purpose of bringing a wife or minor children to this country and yet be denied the benefit of the Bankruptcy Laws on the ground that he is not engaged in business of a mercantile character.

The case directly in point and controlling it is submitted, on the question raised in this appeal is that of *U. S. ex rel. Mak Fou Cho v. James J. Davis, Secretary of Labor*, reported in Washington Law Reporter, Vol. 52, No. 20, page 306, a case decided by the Supreme Court of the District of Columbia, sitting as a Circuit Court in April, 1924. The petitioner in this case was the bookkeeper and cashier of a Chinese restaurant owning an interest therein and performing no manual labor in connection with the conduct of the business. It also appeared that he sold cigars and cigarettes to patrons of the restaurant. There was some testimony to the effect that the petitioner held the title of "Assistant

Manager," but it did not appear that he bought food stuffs or that his was the final word in any important matters. He made application to the Secretary of Labor for preinvestigation of his status as a merchant, in order that he might bring his minor son from China to this country, and the Secretary of Labor had held that his status was not that of a merchant. He then applied for a writ of mandamus, directing the Secretary to approve his application. The petition for writ of mandamus was denied, the court stating:

"Had the respondent found that the restaurant business is not mercantile, and that one carrying it on in any capacity is not engaged in 'buying and selling,' his decision would not have been arbitrary or capricious, for courts have differed as to that in construing the Exclusion Laws, and the Supreme Court, in construing the Bankruptcy Laws, has held that one engaged in the restaurant business is not engaged in a trading or mercantile pursuit. Nollman & Co. v. Wentworth Lunch Co., 217 U. S. 591 following Toxaway Hotel Co. v. Smathers, 216 U. S. 439, where speaking of articles of food the court says: 'Such articles are not bought to be sold, nor are they sold again as in ordinary commerce.' In the Toxaway case it was held also that running a grocery store in connection with the hotel did not make the hotel business mercantile. So here selling cigars and cigarettes does not make the restaurant business mercantile. The respondent therefore did

not make the broad ruling as to the mercantile status which he might have made without interference from the court, and likewise he may not be controlled as to his decision that the petitioner did not come within the more liberal ruling made in other cases, namely, that the part owner of such a restaurant who has charge of buying and selling of food is a merchant. The question was one which the respondent had jurisdiction to decide, and for the reasons already stated herein he can not be forced to make a different decision."

In deciding the present case, Judge Neterer states that the *Mak Fou Cho* case is distinguishable in that the petitioner in that case took no part in buying and selling and his powers were not those of an assistant manager. It is true that a finding was made by the Secretary of Labor to this effect but the opinion also sets out the testimony of the petitioner before the Secretary of Labor's investigating board to the effect that he has the title of "Assistant Manager." In the case now before Your Honors, it does not appear that Wong Chai Chong took any part in the buying and selling. In the instant case, furthermore, according to the statements of both Wong Chai Chong and Kin C. Wong, manager of the Wong Kew restaurant, Wong Chai Chong was formerly *Cashier* and did not become assistant manager until September, 1923.

Consequently, he was assistant manager considerably less than one year prior to respondent's arrival, and for that reason could not have complied with the requirements of section 2 of the Act of November 3, 1893, and could not have obtained the Immigration Bureau's favorable endorsement, even though it be considered that the position of manager or assistant manager of a restaurant is enough to give a mercantile status. As stated before, the regulations of the Department, in conformity with said Act, have always required that a domiciled Chinese merchant must establish a mercantile status for at least one year prior to his application for preinvestigation, and the same requirement has always existed as a condition precedent to securing the admission of a wife or minor child. A Chinese cashier of a restaurant has never been regarded by the Department as a merchant solely by reason of performing the duties of a cashier.

It is not considered, however, that a showing that Wong Chai Chong was assistant manager of the Wong Kew restaurant even for one year prior to respondent's application for admission, would entitle the respondent to admission as the minor child of a merchant.

Judge Neterer also states in his opinion that the Department has uniformly held, heretofore, that an assistant manager, as is the "Petitioner," is classed as a merchant and mentions the fact that two minor sons of the petitioner have heretofore been admitted and are now in the United States. (The word "petitioner" seems to be in error and to really refer to petitioner's father, Wong Chai Chong.) In this connection, it may be stated that the law and regulations were apparently complied with by Wong Chai Chong in 1914 and in 1921, when he brought two sons to this country, and the fact of their admission at the time stated has no bearing on the merits of the present case.

From the Treaty of 1880 until 1893, the proprietor of a restaurant was held to be a laborer. After the decision of the Attorney General in 20 Opinions 602, rendered shortly before the passage of the Act of 1893, the practice of the Department was changed and restaurant keepers were held to be merchants. In 1898 the case of *Ah Yow*, 52 Fed. 561, and *Chung Ki Foon*, 83 Fed. 143, hereinbefore referred to, came to the attention of the Department and the original practice was resumed and followed until December, 1915, when the practice was adopted of holding that, while restaurants are

not mercantile establishments, the owners thereof, whose duties are solely of a managerial or executive nature, are merchants. This practice was continued until the decision in the *Mak Fou Cho* case was rendered and recognized by the Department as the law.

Although the practice of the Department has not been uniform, it needs no citation of authority to your Honors to sustain the proposition that the Department of Labor may change a regulation at any time, provided such change is consistent with the law.

Judge Neterer also states in his opinion, after quoting the definitions of laborer and merchant:

"The Act, for its purpose, divides the Chinese, except those who come to teach, study, travel or for curiosity, etc., into two classes, 'laborers,' those performing manual labor, *excluded*; 'merchants,' those not performing manual labor, *admissible*. 'Merchants' as construed by the Department, and as employed in the Act, is more comprehensive than the meaning given by lexicographers. The restricted meaning of 'merchant' under the Bankruptcy Act—Toxaway Hotel Company v. Smathers and Company—in view of the provisions of the Exclusion Act and Department rule, obviously has no application. A banker, by the Department rules, is a 'merchant.' By the same token the manager

or assistant manager of a restaurant, who performs no manual labor, is a merchant."

This quotation from the opinion would indicate that Judge Neterer considers all Chinese who do not perform manual labor to be merchants, with the exception of those mentioned as the other classes exempted. This view of the law is entirely erroneous.

In *Ong Chew Long v. Burnett*, 232 Fed. 853, it was held that a manufacturer engaged solely in conducting a factory is a laborer. In *U. S. v. Ah Fawn*, 57 Fed. 591, it was held that Chinese gamblers and highbinders are laborers. In *U. S. v. Oin Kwan*, 100 Fed. 609, it was held that a Chinese person assisting in the business of a mercantile company, keeping the books and selling the goods and holding an interest in the stock of the goods of such company, is not a merchant.

In *Lai Moy v. U. S.*, 66 Fed. 955, the court states:

"It will be observed that the definitions of the Act are very careful and confined, and we may not enlarge them. The designation 'merchant' does not include, comprehensively, all who are not laborers, but strictly 'a person (to quote the act) engaged in buying and selling merchandise.' To fabricate merchandise, as appellant did, is not to buy and sell it."

And it was held that a Chinese person, a member of a firm engaged in the clothing business, who assists in cutting and sewing garments for the firm, is not a merchant. It would not be difficult to conceive of several other occupations which a Chinese might follow, which might involve no manual labor and yet not be a merchant and not involving buying and selling. For instance, it would be quite possible for a Chinese to run a lodging house or laundry business of such magnitude that he would perform no manual labor of any description, yet it does not seem that he could properly be classed as a merchant by reason of that fact.

Judge Neterer also referred to the construction placed upon the word "merchant" by the Department as being more comprehensive than the meaning given by lexicographers, and referred to a banker being classed as a merchant. Whether or not a banker should be classed as a merchant does not appear in any way to have any bearing on this case, and the Department's construction of the word "merchant" as applied in the present case, was fully set forth in the record which was before the court, although, of course, had Wong Chai Chong been assistant manager of the restaurant a full year before the respondent's arrival, such con-

struction would have been at variance with the Department's practice from 1915 until the decision of the *Mak Fou Cho* case was rendered and recognized as the law.

It is difficult to understand Judge Neterer's conclusion that the meaning of "merchant" in the *Toxaway Hotel* case "obviously has no application." He simply states a conclusion on this point, basing it on the provisions of the Exclusion Act and Department rule. Such conclusion might be justified as far as Department rule is concerned but Department rules cannot change the law and, furthermore, the Department rule at the time the respondent in this case applied for admission did not allow of a mercantile status for respondent's father, even had the record shown that Wong Chai Chong was assistant manager of a restaurant for one year or more prior to the arrival of the respondent.

A recent decision rendered by Judge Bourquin on December 6, 1924, in the case of *Geung Wah Yu*, No. 18485 in the District Court for the Northern District of California, states:

"To dispose of this application it suffices to say that a keeper of a restaurant who only incidentally sells cigars, is not a 'merchant' within the meaning of the Chinese Exclusion Act. In said Act it has

the ordinary meaning likewise defined in the act which usage does not attach to restaurant proprietors. In re U. S. v. Davis, Dist. Col., April, 1924. Dismissed."

It is, therefore, submitted that the appeal should be sustained and the judgment of the District Court reversed for the following reasons:

1st. Respondent's father, Wong Chai Chong, is not a merchant, for the reason that he was not assistant manager of the Wong Kew Restaurant for a year prior to the arrival of the respondent at this port.

2nd. If he had been assistant manager of said restaurant for a year prior to respondent's arrival, Wong Chai Chong would not be entitled to the status of a merchant within the meaning of the Act of November 3, 1893.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney.